U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

(b)(6)

U.S. Citizenship and Immigration Services

[redacted]

Date: AUG 2 2 2013 Office: TEXAS SERVICE CENTER [redacted]

IN RE: Petitioner: [redacted]
Beneficiary:

Petition: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office (AAO) in your case.

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at http://www.uscis.gov/forms for the latest information on fee, filing location, and other requirements.** *See also* 8 C.F.R. § 103.5. **Do not file a motion directly with the AAO.**

Thank you,

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center denied the immigrant visa petition and the Administrative Appeals Office (AAO) dismissed a subsequent appeal. The matter is again before the AAO on motion to reconsider. The motion to reconsider the petition will be dismissed. The petition remains denied and the AAO affirms its decision of January 24, 2013.

The petitioner is an educational center. It seeks to employ the beneficiary permanently in the United States as a special education teacher. As required by statute, the petition is accompanied by a ETA Form 9089, Application for Permanent Employment Certification, approved by the United States Department of Labor (DOL). The director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition. The director denied the petition accordingly.

The record shows that the motion to reconsider is properly filed. The procedural history in this case is documented by the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary.

A motion to reconsider must: (1) state the reasons for reconsideration and be supported by any pertinent precedent decisions to establish that the decision was based on an incorrect application of law or [USCIS] policy; and (2) establish that the decision was incorrect based on the evidence of record at the time of the initial decision. 8 C.F.R. § 103.5(a)(3). A motion that does not meet applicable requirements shall be dismissed. 8 C.F.R. § 103.5(a)(4).

The petitioner has stated reasons for reconsideration, but has not cited to a precedent decision in support of its request for reconsideration. The regulation at 8 C.F.R. § 103.5(a)(4) states that a motion which does not meet applicable requirements must be dismissed. The motion to reconsider will be dismissed.

8 C.F.R. § 103.5(a)(1)(iii)(C) requires that motions be "[a]ccompanied by a statement about whether or not the validity of the unfavorable decision has been or is the subject of any judicial proceeding, and, if so, the court, nature, date, and status or result of the proceeding." The motion does not include this statement. Therefore, it will also be dismissed for not meeting the requirement of 8 C.F.R. § 103.5(a)(1)(iii)(C).

In the event that the motion was granted, which as set forth above, it is not, the AAO would find that the petitioner has not overcome the director's basis of denial.

Counsel submits balance sheets from the petitioner's certified public accountant (CPA) for 2009 and 2010. Counsel asserts that the total assets are $44,272 and $48,650 respectively, which he asserts easily makes up the difference between the wages paid and proffered wages. The initial AAO decision found that the beneficiary was paid $35,030 and $41,090 in 2009 and 2010; the petitioner's net income in 2009 and 2010 did not overcome the difference between the proffered wage of $47,730 and the wages paid; and the petitioner was not required to complete a Schedule L. The record did not include evidence of net current assets at the time of the decision.

On motion, counsel has submitted balance sheets and letters from the petitioner's accountant. The letters are from and are not signed by an individual. The letters are signed by The letters are dated February 14 and 15, 2013 and state that the balance sheets have been compiled in accordance with Statements on Standards for Accounting and Review Services issued by the American Institute of Certified Public Accountants; the balance sheets have been prepared on the cash basis of accounting; they have not audited or reviewed the balance sheets and do not express an opinion or any other form of assurance on them; and management has elected to omit substantially all of the disclosures and the statements of cash flow required by generally accepted accounting principles.

The regulation at 8 C.F.R. § 204.5(g)(2) makes clear that where a petitioner relies on financial statements to demonstrate its ability to pay the proffered wage, those financial statements must be audited. An audit is conducted in accordance with generally accepted auditing standards to obtain a reasonable assurance that the financial statements of the business are free of material misstatements. The unaudited financial statements that counsel submitted with the petition are not persuasive evidence. The accountant's report that accompanied those financial statements makes clear that they were produced pursuant to a compilation rather than an audit. As the accountant's report also makes clear, financial statements produced pursuant to a compilation are the representations of management compiled into standard form. The unsupported representations of management are not reliable evidence and are insufficient to demonstrate the ability to pay the proffered wage. The AAO notes that the balance sheets for 2009 and 2010 are not clear as to the net currents assets in those years. As the record does not include sufficient evidence of the petitioner's audited net current assets, the AAO cannot determine whether the net current assets would establish the ability to pay the proffered wage or the difference between the proffered wage and the wages paid in 2009 and 2010, if an audited statement were submitted.

The AAO notes that other balance sheets in the record have been prepared using the accrual basis of accounting, the tax returns in the records have been prepared using the cash basis of accounting, and the second set of unaudited balance sheets have been prepared using the accrual basis of accounting. This office is not persuaded by an analysis in which the petitioner, or anyone on its behalf, seeks to rely on tax returns or financial statements prepared pursuant to one method, but then seeks to shift revenue or expenses from one year to another as convenient to the petitioner's present purpose. If expenses are recognized in a given year, the petitioner may not shift those expenses to some other year in an effort to show its ability to pay the proffered wage pursuant to some hybrid of accrual and cash accounting.[1]

If the motion were granted, the petition would remain denied for the above stated reason. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

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[1] Once a taxpayer has set up its accounting method and filed its first return, it must receive approval from the IRS before it changes from the cash method to an accrual method or vice versa. *See* http://www.irs.gov/publications/p538/ar02.html#d0e2874 (accessed November 15, 2011).

ORDER: The motion is dismissed. The petition remains denied. The AAO affirms its decision of January 24, 2013.